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December 10, 1999

Chairman William Kennard
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Subject: Comments in WT Docket No. 99-217, CC Docket No. 96-98

Dear Chairman Kennard:

The City of Concord submits comments in this proceeding:

- 1) To inform the Commission the City of Concord strongly opposes preemption of local agencies' authority over the public rights-of-way, local zoning controls on antenna and state and local tax authority, and;
- 2) To respond to charges made in this proceeding against the City of Concord by GST Telecom

The City of Concord will soon enjoy, for the first time ever, competition in cable television services. Seren Innovations, Inc. of Minneapolis, Minnesota received a non-exclusive franchise from the Concord City Council on July 27, 1999. Seren is currently building their advanced broadband system in direct competition with AT&T/TCI, the City's other cable franchise holder. Seren's system in Concord will offer phone, cable, high-speed Internet and video-on-demand.

The City Council approved the franchise with Seren Innovations in less than two months from the date the City received complete application materials from the company, which was approximately five months from the first formal inquiry to the City. This quick response by the City demonstrates our commitment to competition and the speed at which local government can respond and resolve the complex issues surrounding the granting of a new franchise and permitting of a new telecommunications provider.

Several years ago, the City of Concord successfully concluded a franchise agreement with Metricom, Inc. for the installation of their innovative wireless Internet and email service. Metricom has attached their radios to over fifty City-owned light standards. The company and the City are enjoying a mutually beneficial relationship. The City welcomes this new telecommunications service and our residents and businesses are profiting from it.

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Regarding GST Telecom, that company filed comments with the Commission in this proceeding dated Oct 12, 1999 citing alleged abuses of local government. GST's comments included a reference to the City of Concord, "Although GSTC has previously been required to waive statutory rights, or to provide an indefeasible right of use of fiber as a condition of permit issuance, GSTC has determined that it can not afford to undermine its long-term competitive position by agreeing to the inequitable and excessive demands of every municipality." (pages 6 & 7, "Comments of GST Telecom California, Inc." received by the Commission on October 12, 1999). This statement was footnoted in as follows, "GSTC, as a condition of placing telecommunications 20-year facilities in the City of Concord, was forced to agree to allow the City to purchase a 20-year IRU for three fibers for the pittance of \$2,500, to indemnify the City for any and all claims by third parties for service interruptions, and to refrain from initiating any federal or state complaint, action, or proceeding of any kind."

GSTC failed in their comments to inform the Commission of the following:

- 1) GST's California Public Utilities Commission (CPUC) Certificate of Public Convenience and Necessity (Section 7901 Permit) submitted to the City of Concord at the time of their application to construct their system contained the clause, "Any necessary health and safety permits or *municipal franchises as required* for the construction and operation of Lightwave's initial service areas have been or will be obtained from the appropriate city...". GST Telecom was known at the time as GST Lightwave. Emphasis has been added in this clause to the phrase, "municipal franchises as required".
- 2) The City of Concord inquired to the CPUC as to the relevance of the language contained in GST's 7901 Permit. The CPUC informed the City that it means what it says, that if the City determines a municipal franchise is required, GST must comply.
- 3) The City of Concord gave GST the option to return to the CPUC to have the language struck from their 7901 Permit, or obtain an interpretation favorable to their position. GST failed to acquire either an amendment of their permit, or a favorable interpretation from the CPUC.
- 4) In lieu of negotiating a franchise agreement, GST and the City decided to negotiate an Optical Fiber Use Agreement. The negotiation of the agreement resulted in a compromise with the City receiving less benefit than initially requested and certainly less benefit than if a franchise were required. The Optical Fiber Use Agreement, for example contains no requirement that GST pay a franchise fee, offer PEG support or provide other community services typically found in a franchise agreement.
- 5) The Optical Fiber Use Agreement resulted in both parties receiving benefit from the transaction. GST was apparently not too upset at the time because the Agreement included this section, "At the conclusion of the initial Term (20-years), the parties agree to use good faith efforts to renegotiate another IRU agreement at mutually acceptable terms and conditions".

- 6) GST successfully constructed their project with expeditious permit processing by the City of Concord.

The City of Concord believes GST's October 12, 1999 comments to the Commission violate the very agreement they currently decry. Section 11 of the Agreement states, "Unless otherwise required by state or federal laws, each party agrees to take all reasonable actions to protect, and to maintain in strict confidence, all plans, designs, drawings, trade secrets, and other proprietary information, *including the terms and conditions of this Agreement* ("Confidential Information") that are disclosed without the disclosing party's consent, during the performance of this Agreement and for a period of two (2) years after its termination for any reason." (emphasis added). Also stated in Section 11 of the Agreement, "If the receiving party is compelled by lawful process to disclose any portion of the Confidential Information, it shall provide the disclosing party with prompt written notice. Accordingly, the aggrieved party shall be entitled to equitable relief, including an immediate injunction and specific performance, in addition to any other legal remedies it may otherwise be entitled to."

The City of Concord has faithfully upheld the terms of the Agreement with GST by not disclosing the terms and conditions of the agreement. GST, however, elected to disclose information on the terms and conditions of the Agreement by its comments in these proceedings without providing the required written notice to the City of Concord. The City of Concord does not object to disclosure of the Agreement. Our concern is that if GST had communicated its intention to the City to file comments on the Agreement in this proceeding their comments to the Commission may have been more aligned with the facts.

As cited in the Seren Innovations and Metricom, Inc. examples above, the City of Concord has recognized the importance of the rapid development of telecommunications infrastructure within our jurisdiction, and we are realizing this result in partnership with the companies that are doing work in the public rights-of-way. We are successfully managing the rapid deployment of advanced services with effective mitigation of the environmental impacts of that deployment.

For example, Seren Innovations and the City of Concord are working together on a mitigation monitoring process to place above-ground amplifiers, node pedestals and power supplies within the public rights-of-way in residential areas as the company builds their advanced broadband system. An environmental monitor hired by the City jointly reviews proposed locations for above-ground facilities with a Seren representative.

Many factors are evaluated to place facilities at locations which will have the least visual, aesthetic, noise (for power supplies) and safety impacts (e.g. not within sight lines for traffic turning movement, separation from fire hydrants). The City and Seren notify adjacent property owners of the proposed placement and landscaping, placement and color selection details are

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agreed upon. In addition to siting above-ground facilities, the City and Seren are working cooperatively through the encroachment permit process to manage other impacts such as dust, construction noise, plating of trenches, traffic control and notification to residents. This process is resulting in a quality installation of facilities that will well-serve our residents and the company for many years into the future.

The cooperation and care demonstrated in the environmental mitigation and construction permitting process has not delayed the deployment of facilities. The City's goal and the company's goals are common; to build an advanced broadband system that meets the needs of the community. These needs include adequate attention to environmental and permitting process as facilities are established in the public rights-of-way.

In summary, the City of Concord is providing telecommunications companies with non-discriminatory access to the public rights-of-way consistent with our obligation to administer a fair, efficient and expeditious regulatory regime for determining just and reasonable conditions on access with a minimum of administrative costs.

Sincerely,

A handwritten signature in black ink, reading "Peter Dragovich". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Peter Dragovich
Assistant to the City Manager

cc: Mayor and Members of the City Council
City Manager
Assistant City Manager
Assistant City Attorney
Cresston Gackle, Franchise & Regulatory Liaison, Seren Innovations, Inc., 15 South 5th
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